

1
2
3
4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

6 * * *

7 MICHAEL TRAYNOR,

8 Plaintiff(s),

9 v.

10 COLORADO CASUALTY INSURANCE
11 COMPANY aka/dba SAFECO INSURANCE,
et al.,

12 Defendant(s).

Case No. 2:16-CV-251 JCM (PAL)

ORDER

13
14 Presently before the court is plaintiff Michael Traynor's objections to Magistrate Judge
15 Leen's granting defendant United Financial Casualty Company's ("United") motions to strike.
16 (ECF No. 54, 55). United has filed corresponding responses. (ECF No. 58, 59).

17 **I. Introduction**

18 It is helpful here to review the objections in the opposite order than they were filed due to
19 the first objection's logical relationship to the second. The second objection is based upon the
20 magistrate judge's alleged error of striking Dr. Jeffery Gross's Medical Life Care Plan and
21 plaintiff's fourth supplemental disclosure. (ECF No. 55). Plaintiff argues that "Mr. Traynor's
22 need for future medical treatment could only be ascertained after his recovery from the March 1,
23 2016, cervical surgery," so "Dr. Gross's October 24, 2016, Report is a proper supplemental report
24 under [Federal Rule of Civil Procedure] 26(e) as it is based on information that was not available
25 to Dr. Gross at the time of any prior Report or Opinion." (*Id.* at 3).

26 Plaintiff also objects to the magistrate judge striking plaintiff's fifth supplemental
27 disclosure and Dr. Terrence Clauretie's report calculating a present value of plaintiff's future
28 medical costs because plaintiff did not anticipate a need for Dr. Clauretie's report until Dr. Gross

1 submitted his October 26, 2016, medical life care plan. (ECF No. 54). In particular, plaintiff
2 argues that this delayed submission was “substantially justified and harmless” because the timing
3 of Dr. Clauretie’s report depended on Dr. Gross’s late submission. (*Id.*). Thus, if Dr. Gross’s
4 report was inexcusably tardy, then Dr. Clauretie’s report likely is also.

5 United responds, *inter alia*, that rule 26(e) does not simply permit disobedience towards
6 scheduling orders and that plaintiff has submitted no authority indicating that a doctor requires a
7 six-month post-surgery period to discern whether additional medical treatment is needed. (ECF
8 No. 59).

9 II. Legal Standard

10 The court reviews a motion to reconsider a magistrate judge’s ruling under the “clearly
11 erroneous or contrary to law” standard set forth in 28 U.S.C. § 636(b)(1)(A) and Fed. R. Civ. P.
12 72(a). “A finding is ‘clearly erroneous’ when, although there is evidence to support it, the
13 reviewing court on the entire evidence is left with the definite and firm conviction that a mistake
14 has been committed.” *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see also*
15 *Anderson v. Equifax Info. Services LLC*, 2007 WL 2412249, at *1 (D. Or. 2007) (“Though Section
16 636(b)(1)(A) has been interpreted to permit *de novo* review of the legal findings of a magistrate
17 judge, magistrate judges are given broad discretion on discovery matters and should not be
18 overruled absent a showing of clear abuse of discretion.” (citation omitted)).

19 Federal Rule of Civil Procedure 37 governs a court’s ability to impose sanctions for a
20 party’s failure to make disclosures or cooperate during the discovery process. Specifically, rule
21 37(c)(1) provides:

22 If a party fails to provide information or identify a witness as required by Rule 26(a)
23 or (e), the party is not allowed to use that information or witness to supply evidence
24 on a motion, at a hearing, or at a trial, unless the failure was substantially justified
or is harmless.

25 III. Discussion

26 a. Dr. Gross’s report

27 The court agrees with United’s reasoning regarding Dr. Gross’s report. *See* (ECF No. 59);
28 *see also Allstate Ins. Co. v. Balle*, No. 2:10-CV-02205-APG, 2013 WL 5797848, at *2 (D. Nev.

1 Oct. 28, 2013). As United points out, “[i]nitial expert disclosures in this case were due August 8,
2 2016.” (ECF No. 58). However, plaintiff disclosed Dr. Gross’s Medical Life Care Plan on October
3 26, 2016. (*Id.*). Plaintiff offers that “[w]ithin the medical community, six (6) months after surgery
4 is generally considered the reasonable time at which to assess the ‘permanent’ status of a surgical
5 patient.” (ECF No. 55 at 8). However, plaintiff makes this statement without a citation to, or
6 declaration from, any medical authority. (*Id.*).

7 Furthermore, plaintiff asserts that United has not suffered prejudice both because the
8 stricken report provides a valuation for future medical needs that plaintiff asserts it is permitted to
9 discuss anyways and because defendant had opportunities to question Dr. Gross about the new
10 report. (ECF No. 55).

11 United contests this assertion, referencing the need to not only re-interview Dr. Gross but
12 also “retain new experts, including economists.” (ECF No. 59 at 3). United suggests that these
13 services would not be performed *gratis*. (*Id.*). Therefore, even without considering the additional
14 impact of an extended pretrial schedule, defendant persuasively indicates that reversing the
15 magistrate’s decision would cause prejudice. (*Id.*). Continuance would not alleviate this harm,
16 and United would incur these expert fees trying to cure the surprise. *See (id.)*; *see also R & R*
17 *Sails, Inc. v. Ins. Co. of Pennsylvania*, 673 F.3d 1240, 1247 (9th Cir. 2012).

18 In light of the lack of a satisfactory explanation for the delay to examine plaintiff and issue
19 a report until after the relevant disclosure period had elapsed, and the cost of additional experts,
20 plaintiff’s dilatory disclosure of Dr. Gross’s report is neither substantially justified nor harmless.
21 *See Fed. R. Civ. P. 37(c)(1)*.

22 *b. Dr. Clauretie’s report*

23 Plaintiff concedes that the late entry of Dr. Clauretie’s report into the present case is a
24 product of the late entry of Dr. Gross’s report. *See* (ECF No. 54). Because the latter report’s delay
25 was not justified, neither is the corresponding post-deadline entry of Dr. Clauretie’s report.¹

26 ¹ In fact, plaintiff argues that Nevada law does not actually require the present-value calculations
27 that Dr. Clauretie’s report would provide. (ECF No. 54).
28

1 The court now turns to the “harmless” inquiry. This report is likely a greater surprise to
2 the defendant than Dr. Gross’s report, in light of plaintiff’s statement that “Dr. Clauretie’s
3 involvement in this case was a surprise to all parties.” (ECF No. 54). In addition, United also
4 asserts here the argument that new experts, such as economists, would be necessary to contest Dr.
5 Clauretie’s findings. (ECF No. 58). Unlike with Dr. Gross, it appears that there has been no
6 previous deposition of this expert. *See* (ECF Nos. 54, 58). Consequently, it appears that the court’s
7 reasoning to deny the previously analyzed objection (ECF No. 55) extends to this objection (ECF
8 No. 54) as well. *See R & R Sails, Inc.*, 673 F.3d at 1247.

9 **IV. Conclusion**

10 In sum, both of plaintiff’s objections to the magistrate judge’s order will be denied for
11 failure to show justification or harmlessness, pursuant to rule 37(c)(1).

12 Accordingly,

13 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiff’s objections to
14 the magistrate judge’s order to strike (ECF Nos. 54, 55) be, and the same hereby are, DENIED.

15 DATED May 9, 2017.

16 
17 UNITED STATES DISTRICT JUDGE
18
19
20
21
22
23
24
25
26
27
28